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no.

In the SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1982

SAMUEL CLYDE MORRELL, etc.,
Petitioner
v.
DUKE UNIVERSITY, INC., et. al.,
Respondent

SAMUEL CLYDE MORRELL, etc.,
Petitioner
v.
DR. HOWARD E. STRAWCUTTER, et. al.,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

This appeal raises the following two important questions of Federal Civil Procedure under Rule 41(a) which have not been directly decided by this Court but which have been decided differently by the various circuit courts of appeal:

(1) DO F.R.CIV.P. 41(a)(1)(ii) AND F.R.CIV. P. 41(a)(2) PERMIT A PLAINTIFF TO TAKE A DISMISSAL AGAINST LESS THAN ALL OF SEVERAL DEFENDANTS?

(2) WHEN A PLAINTIFF AND CERTAIN DEFENDANTS AGREE TO A F.R.CIV.P. 41(a) DISMISSAL OF THEIR LITIGATION ON CERTAIN CONDITIONS, CAN OTHER DEFENDANTS OR THE TRIAL COURT VETO THAT DISMISSAL BY REFUSING TO CONSENT?

In addition, this appeal raises the following two questions of Federal Civil Procedure which require this court, in its supervisory capacity, to correct the trial court's departure from the accept-

ed and usual course of judicial proceedings (as sanctioned by the Court of Appeals) and to provide needed guidance to other federal trial courts:

(3) EVEN IF THE PLAINTIFF DID NOT INVOKE A STIPULATION OF DISMISSAL UNDER RULE 41(a)(1)(ii) AND EVEN IF THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT PLAINTIFF'S RULE 41(a)(2) MOTION TO DISMISS THE DUKE DEFENDANTS WITHOUT PREJUDICE, COULD THE COURT GRANT THE DUKE DEFENDANTS' SUBSEQUENT RULE 41(b) MOTION FOR AN INVOLUNTARY DISMISSAL WITH PREJUDICE BASED ON THE COURT'S PERCEPTION THAT PLAINTIFF COULD NOT PREVAIL AT TRIAL?

(4) WHEN THE TRIAL COURT OF ITS OWN VOLITION ASSURES COUNSEL PRIOR TO CLOSING ARGUMENTS THAT IT WILL GIVE THE STATE PATTERN JURY INSTRUCTIONS ON INFORMED CONSENT AND PLAINTIFF'S COUNSEL THEREFORE DOES NOT REQUEST AN INFORMED CONSENT INSTRUCTION SPECIFICALLY TAILORED TO THE FACTS OF THE CASE, CAN THE

COURT ON ITS OWN INITIATIVE DELETE THE IN-FORMED CONSENT INSTRUCTION AFTER CLOSING ARGUMENTS HAVE ALREADY BEEN MADE?

PARTIES

Two civil actions were consolidated for trial and for appeal before the Fourth Circuit:

Samuel Clyde Morrell, an incompetent person by his Committee, Henry Clyde Morrell, Plaintiff - Petitioner,

v.

Duke University, Inc., Duke University Medical Center, Duke Hospital, David F. Paulson, M.D. and Michael J. Moran, M.D., Defendant - Respondents,

and

Luis Gonzalez-Serva, M.D., Southeastern General Hospital, and Warren L. Williamson, M.D., Defendants - (not parties to the appeal in the Fourth Circuit)

Samuel Clyde Morrell, an incompetent person by his Committee, Henry Clyde Morrell, Plaintiff - Petitioner

v.

Dr. Howard E. Strawcutter, Dr. William R. Burleson and Dr. J. Thomas Leininger, individually and as partners, doing business under the common name and style of Urology Clinic at all times material to the action, Defendant - Respondents

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OTHER AUTHORITIES

5 Moore's Federal Practice, §41.06-1 21

9 Wright and Miller, Federal Practice and Procedure, §2362 20

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals, dated May 5, 1982, and unpublished, is printed in Appendix A. The order denying rehearing en banc is printed in Appendix B. The transcript of the motion hearing of March 9, 1981, in which the trial court ultimately denied plaintiff's Rule 41 (a)(2) motion is contained in Appendix C and the court's order granting the defendant's Rule 41 (b) motion is contained in Appendix D.

JURISDICTION

The opinion of the Court of Appeals for the Fourth Circuit was filed on May 5, 1982, and its order denying rehearing en banc was filed on June 29, 1982. This Court has jurisdiction pursuant to Section 1254(1) of Title 28 of the United States Code.

RULES OF CIVIL PROCEDURE INVOLVED

Questions 1 and 2 of this appeal involve F.R.CIV.P. 41(a) which reads as follows:

> (a) VOLUNTARY DISMISSAL: EFFECT THEREOF:
> (1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without an order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.
> (2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems pro-

per. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Question 3 of this appeal involves

F.R.CIV.P. 41(b) which reads as follows:

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against

> the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Question 4 of this appeal involves F.R.CIV.P. 51 which reads as follows:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

On July 16, 1976, Samuel Clyde Morrell was a 25 year old resident of South Carolina. On that date he developed nausea and fatigue and he was admitted to Southeastern General Hospital in Lumberton, North Carolina under the care of Dr. Strawcutter and his associates. The admitting diagnosis was kidney infection, relating to a congenital abnormality. By the morning of July 22 Sammy's condition had deteriorated and his physicians realized that he was not responding to systemic antibiotic medication.

Although there is no such notation in the medical chart, the Strawcutter defendants contend that they had diagnosed a perinephric abscess and were ready to perform the necessary urgent surgery by this date. In any case, an early morning discussion was held between Sammy's family and Dr. Strawcutter in which Dr. Strawcutter agreed to arrange the patient's transfer to

Duke Hospital. It is uncontested that Dr. Strawcutter never discussed a perinephric abscess with Sammy or his family nor discussed any dangers in delaying the immediate drainage of that abscess by transferring the patient to a hospital three hours away.

At approximately 8:00 p.m. on July 22 Sammy left Southeastern General Hospital by ambulance and he arrived at Duke Hospital shortly before midnight. His condition was immediately diagnosed as perinephic abscess but, since Sammy had become dehydrated during the ambulance trip, surgery was delayed until the afternoon of July 23, 1976.

Shortly after surgery, Sammy developed high fevers, which were uncontrolled by the Duke hospital personnel, and he suffered seizures and severe anoxic damage to the brain. Since that time he has remained totally and permanently disabled- unable to walk, talk or do anything for himself. He has required constant nursing care since this

catastrophe. By the time of the trial of this action, more than $250,000 had been expended by or on behalf of the plaintiff for medical and nursing care with the prospect of continued large expenditures for the rest of his life.

These two civil actions, consolidated for trial, alleged medical and hospital negligence against the defendants. The plaintiff, Henry Clyde Morrell, was the guardian, or committee, of his son, Samuel Clyde Morrell, who had been adjudicated as being incompetent due to the severe brain damage allegedly proximately caused by the negligence of the defendants in these two actions. Federal jurisdiction was predicated on diversity.

The action against defendants Howard E. Strawcutter, William R. Burleson and J. Thomas Leininger (hereinafter referred to as the Strawcutter defendants) was filed on February 1, 1978. The action against Duke University, David F. Paulson, Michael J. Moran

hereinafter referred to as the Duke defendants) along with Southeastern-General Hospital and Warren L. Williamson was filed on July 19, 1979. The two cases were consolidated for discovery and trial by order on November 26, 1979. Thereafter, the Strawcutter defendants moved to sever its case from that of the Duke defendants. The motion was denied on April 18, 1980, "without prejudice, however, to the rights of any interested party to renew the motion at the final pre-trial conference at which time the issues to be tried will be more sharply defined."

Prior to the conference of attorneys before the final pre-trial conference, plaintiff filed a motion pursuant to Rule 41(a)(2) requesting that the Court dismiss the Duke defendants without prejudice to the right of the plaintiff to refile the action against the Duke defendants within one year in any state court having proper jurisdiction (Appendix

E.) The Duke defendants filed their consent to the granting of this motion (Appendix F). On February 20, 1981, without holding any hearings, the Court entered an order granting plaintiff's motion (Appendix G). On February 26, 1981, defendant Southeastern General Hospital, Inc. filed an objection to the dismissal of the Duke defendants (Appendix H) and, because defendants had not had an opportunity to be heard on plaintiff's 41(a)(2) motion, the Court, by order dated March 3, 1981, rescinded its order granting plaintiff's motion (Appendix I) and scheduled the matter for hearing on March 9, 1981. Prior to that hearing, defendant Southeastern General Hospital, Inc., withdrew its previously filed objection and stated to the Court that it would not be prejudiced by the granting of plaintiff's motion (Appendix J). Also, at the hearing, the remaining

defendants stated in open court that none of them had any objection to the granting of plaintiff's motion, although none were willing to consent to it (Appendix C). The Court, however, denied plaintiff's motion under Rule 41(a)(2) and directed all parties to prepare for trial (Appendix C). Plaintiff's motion to reconsider was also denied despite the continued support of the Duke defendants dated March 26, 1981 (Appendix K).

Thereafter, in response to interrogatories previously served upon the plaintiff by the Duke defendants, plaintiff acknowledged that he had not expected to go to trial against the Duke defendants and he did not currently have any expert witnesses ready to testify on the question of negligence as to those defendants. On April 7, 1982, the Duke defendants who also had not expected to go to trial, filed a motion for dismissal of plain-

tiff's action against them with prejudice under the provisions of Rule 41(b). By order of April 8, 1981, the Court then granted the involuntary dismissal motion of the Duke defendants and entered judgment against the plaintiff as to them. The defendant Luis Gonzales-Serva, a resident at Duke at the time of the events in question, had left the continental United States, was never served with process and the Court never acquired jurisdiction over his person. Therefore, the case against him was dismissed. Although, plaintiff's claims with defendant Southeastern General Hospital, Inc., were settled prior to trial and that defendant did not participate in trial, the Court refused to sign an appropriate order confirming the partial settlement and dismissing the action against that defendant with prejudice until the conclusion of the trial.

Without objection from the plaintiff, the action against Dr. Warren L. Williamson was dismissed with prejudice by summary judgment on March 24, 1981.

The action against the Strawcutter defendants proceeded to trial by jury before Judge W. Earl Britt in Fayetteville, North Carolina, and was tried for more than two weeks beginning April 27, 1981. Upon the jury's verdict of no negligence, the Court entered judgment thereon on May 13, 1981, in favor of these defendants. From the entry of that judgment, from the denial of plaintiff's Rule 41(a)(2) motion and from the entry of the order of involuntary dismissal under Rule 41(b) as to the Duke defendants, the plaintiff perfected an appeal to the Fourth Circuit Court of Appeals.

In an unpublished decision dated May 5, 1982, the Fourth Circuit Court of Appeals affirmed all the actions of the

trial court and on June 29, 1982 the plaintiff's petition for rehearing en banc was denied.

REASONS FOR GRANTING CERTIORARI

I.

F.R.CIV.P. 41(a)(1)(ii) AND F.R.CIV.P. 41(a)(2) PERMIT A PLAINTIFF TO TAKE A DISMISSAL AGAINST LESS THAN ALL OF SEVERAL DEFENDANTS.

In an ordinary civil lawsuit, no one should have the power to force a plaintiff and defendant to continue litigation after they have agreed to a settlement of their dispute. In the present case the plaintiff and the Duke defendants agreed to a Rule 41(a) dismissal of their action without prejudice to the right of the plaintiff to refile that action in state court within one year. After the fortuitous chain of events that led to the dismissal of the Duke defendants with prejudice, those defendants argued in the Court of Appeals that the plaintiff actually never had the power to obtain a voluntary dismissal against them under either Rule 41(a)(1)(ii) or Rule 41(a)(2) since there were other defendants in the lawsuit.

The factual history of plaintiff's attempt to dismiss the action against the Duke defendants is outlined in the Court of Appeals'concurring opinion as follows:

> . . . because of the expense of caring for their son and preparing the case against the Strawcutter defendants, the plaintiff's parents could not afford to engage an expert witness to testify against the Duke defendants. The plaintiff's attorney properly realized that he could not proceed against the Duke defendants without the support of expert testimony. Confronted by the inability to obtain an expert, he did the next best thing. Months before trial, he obtained the consent of the Duke defendants for a voluntary non-suit without prejudice. But because he did not receive the consent of all defendants, he was unable to proceed within the letter of rule 41(a)(1)(ii). Consequently, he moved for dismissal of the Duke defendants without prejudice pursuant to rule 41(a)(2). The Duke defendants consented to this motion, and the court granted it. Later, however, when another party objected, the court rescinded tne order of dismissal. [Appendix A, p.72]

At the rehearing of this motion, the trial court indicated that it was faced with the question of "whether plaintiff and defendant, Duke University, may agree for Duke University

to get out" [Appendix C, p.77]

Answering this question requires the resolution of the following two intertwined issues: (1) whether the Rules permit a plaintiff to take a dismissal against less than all of several defendants (the issue discussed in this section of the argument) and (2) whether an agreement of dismissal between a plaintiff and some but not all of the defendants can be vetoed by another defendant or the court itself (discussed in section II of this argument). Each of these issues turns on the definition of the word "action" in Rule 41(a).

The various federal circuits have produced different definitions of the word "action" and thus different interpretations of Rule 41. As the Duke defendants explained in their brief in the Court of Appeals:

> Plaintiff develops at some length one branch of the dichotomy of case law which is addressed to the propriety of a dismissal under Rule 41(a)(2) of an action as against less than all of several Defendants. The divided case

> law turns upon the construction to be given to the word "action" as it appears in the first sentence of Rule 41(a); i.e., whether "action" in Rule 41(a) means all claims against any one Defendant, and hence a voluntary dismissal under the Rule against less than all of several Defendants is proper, or whether "action" in Rule 41(a) means the entire controversy against all Defendants, and hence a voluntary dismissal under the Rule is not proper as against less than all of the several Defendants. (p.7)
>
> . . . if the Court adheres to that branch of the case law dichotomy represented by the leading case of Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F. 2d 105 (2d Cir. 1953); cert. denied, 345 U.S. 964, 97 L. Ed. 1383, 73 S. Ct. 949, the Harvey Aluminum decision supporting the view that partial dismissal cannot be effected by mere notice under Rule 41(a)(1)(i), partial dismissal in the case at bar would be improper under Rule 41 - whether such be under 41(a)(1)(i) or 41(a)(1)(ii) or 41(a)(2) . . . (p.7-8)

As the defendants had encouraged, the Fourth Circuit did indeed follow the lead of the Harvey Aluminum case. In his briefs in the Court of Appeals, plaintiff cited extensive authority for the proposition that plaintiff's Rule 41(a)(2) "motion," with the

consent of the defendants to be dismissed, was actually effective as a stipulation of dismissal under Rule 41(a)(1)(ii) without any act or exercise of discretion on behalf of the trial court and without any consent by other defendants. The Fourth Circuit recognized that this issue had been preserved on appeal but dismissed the argument with a reference to Harvey Aluminum and an implication that the plaintiff's stipulation of dismissal had not been signed by all parties who had appeared in the "action."

In their brief in the Court of Appeals, the Duke defendants traced the evolution of this troubling division of authority on the definition of the word "action" in Rule 41:

> The division of federal authorities apparently originated in 1953 when a District Court in the Seventh Circuit permitted the Government to dismiss thirty-six of the Defendants in an action alleging [conspiracy] to violate antitrust statutes, the Government moving the Court for dismissal of these Defendants without prejudice under Rule 41(a)(2). The Court allowed the Government's motion, though noting that not all of the

Defendants were so released, and hence it was not applying Rule 41(a) to the entire "action". United States v. E. I. DuPont De Nemours & Co., 13 F.R.D. 490 (Ill. 1953). One month later, the Second Circuit, in Harvey Aluminum, construed the term "action" as used in Rule 41(a) to denote the "entire controversy", and not just a "claim" or "cause of action", holding that Plaintiff was precluded from taking a voluntary dismissal by notice under Rule 41(a)(1)(i) as against only certain of the Defendants - the Court holding that the proper method for eliminating only certain of the Defendants would be under Rule 21 providing that parties may be dropped or added by Order of Court and on Motion. This was the leading case of Harvey Aluminum Company, Inc. v. American Cyanamid Co., supra. As cited by Plaintiff in the case at bar, the District Court in Massachusetts thereafter followed the 1953 E.I. DuPont decision, supra, in Terry v. Pearlman, 42 F.R.D. 335 (Mass. 1967), the Court holding in Terry that Plaintiff's dismissal by notice under Rule 41(a)(1)(i) could be effected against four of five Defendants, with the Court construing the word "action" as used in Rule 41(a)(1) to mean all of the claims against any one or more of the Defendants and not necessarily all of the claims against all of the Defendants (p.8-9).

Although the Second Circuit has generally adhered to the view expressed in Harvey Aluminum and the Fourth Circuit has now

joined that school of thought, other circuits have developed a consensus that Rule 41(a) allows a plaintiff to take a voluntary dismissal with regard to one of several defendants. Treatises uniformly recognize both the existence of the conflict and the infirmity of the Harvey Aluminum position:

> Both branches of Rule 41(a) refer to dismissal of 'an action.' This led the Second Circuit to hold that 'the word "action" as used in the Rules denotes the entire controversy, whereas "claim" refers to what has traditionally been termed "cause of action,"' and that, accordingly, a plaintiff that wanted to dismiss with regard to one of several defendants could not use Rule 41(a) but had to proceed under Rule 21. Some other courts followed the Second Circuit and adopted the same interpretation. The sounder view and the weight of authority are, however, to the contrary. (9 Wright and Miller, Federal Practice and Procedure, §2362)
>
> This brings us to situation 1, where plaintiff seeks to dismiss as to a party who is not misjoined and whose presence does not destroy diversity. Although the Harvey Aluminum case indicates the contrary, and has sometimes been followed, the better view is that the court has power to permit the dismissal under Rule 41. And this should hold true whether it

> is fewer than all the defendants against whom a dismissal is sought to be taken, or fewer than all the plaintiffs seeks to withdraw from the action.
>
> Moreover, where appropriate, such dismissal should be allowed under either Rule 41(a)(1) or 41(a)(2). (5 Moore's Federal Practice, §41.06-1)

A clear consensus exists that under Rule 41(a)(2) a court can order the dismissal of a "action" against one of several co-defendants. Young v. Wilky Carrier Corp., 150 F. 2d 764 (3rd Cir. 1945) cert. denied 326 U.S. 786 (a dismissal of one of two defendants upheld under Rule 41(a)(2) over objection of another defendant). Most courts have interpreted Rule 41(a)(1)(i) to allow a plaintiff to take an automatic dismissal of an action against one of several defendants, as long as the defendant to be dismissed has not himself filed an answer - without the stipulation or consent of other parties, Terry v. Pearlman 42 F.R.D. 335 (Mass. 1967) (filing of answer by another defendant was irrelevant). In Plains Growers,

Inc. v. Ickes-Braun Glasshouses, Inc., 474, F. 2d 250, 254 (5th Cir. 1973), the Court wrote:

> The difficulty comes from the use of the identical word 'action' in Rule 41(a)(2) which requires a court order. There is little merit in an argument that the court could not dismiss the action as to less than all defendants upon motion, and yet there is nothing in the Rule to indicate an intent to make the word 'action' mean 'all' in 41(a)(1) and mean less than 'all' in 41(a)(2).

Although few cases have been reported under Rule 41(a)(1)(ii), a plaintiff also has the right to take an automatic dismissal of an "action" against one of several co-defendants by stipulation.

> Several courts have not objected to stipulations dismissing individual parties or claims to a lawsuit without dismissing the entire controversy. See Pipeliners Local Union No. 798, Tulsa, Oklahoma v. Ellerd, 503 F. 2d 1193 (10th Cir. 1974); Rudloff v. Johnson, 267 F. 2d 708 (8th Cir. 1959); Battle v. Municipal Housing Authority for City of Yonkers, 53 F.R.D. 423 (S.D. N.Y. 1971). [Oswalt v. Scripto, Inc. 616 F. 2d 191, 195 (5th Cir. 1980)]

Other courts have agreed, Watwood v. Barber, 70 F.R.D. 1,3 (N.D. Georgia, 1976) (allowing dismissal of one of several co-defendants under Rule 41(a)(1)(ii); Battle v. Municipal Housing Authority for City of Yonkers, 53 F.R.D. 423, 424, (S.D.N.Y., 1971) (upholding stipulation dismissing two defendants in their individual capacity); First National Bank of Toms River, N.J. v. Marine City Inc., 411 F. 2d 674 (3rd Cir. 1969) (upholding stipulation dismissing third party defendants only). These cases explicity or implicitly define "action" in Rule 41(a) as being a claim asserted by a party against a particular defendant.

Although the consensus of federal authority permits a dismissal against fewer than all of several defendants under either Rule 41(a)(1)(i), Rule 41(a)(1)(ii), Rule 41(a)(2) or Rule 41(b), federal courts have sometime attempted to restrictively interpret certain clauses of the Rule. Indeed, the

trial court in this case was apparently so confused by the requirements of Rule 41 that he refused to enter an order approving plaintiff's monetary settlement with Southeastern General Hospital until after the trial against the Strawcutter defendants. The Fourth Circuit has now followed the Harvey Aluminum decision and the time has come for this Court to conclusively interpret Rule 41. The mere existence of other defendants, without cross-claims, should not preclude a plaintiff from obtaining a proper dismissal under Rule 41(a)(1)(ii) or Rule 41(a)(2) against one defendant.

II.

WHEN A PLAINTIFF AND CERTAIN DEFENDANTS AGREE TO A F.R.CIV.P. 41(a) DISMISSAL OF THEIR LITIGATION ON CERTAIN CONDITIONS, NEITHER THE TRIAL COURT NOR OTHER DEFENDANTS MAY VETO THAT DISMISSAL BY REFUSING TO CONSENT.

As discussed above, the threshold question in interpreting Rule 41(a) is whether or not that rule permits a dismissal against less than all the defendants in the lawsuit. The resolution of that question necessarily answers the question of who must consent to a Rule 41(a)(1)(ii) dismissal since both issues depend on an interpretation of the word "action." The Rule reads in pertinent part as follows: "an action may be dismissed by the plaintiff without an order of court. . . by filing a stipulation of dismissal signed by all parties who have appeared in the action" (emphasis added).

Clearly the word "action" can not have two different meanings in the same sentence. If this Court rejects the Harvey Aluminum school of authority and accepts the consensus definition of "action" as "all of the claims against one or more of the defendants," then Rule 41(a)(1)(ii) clearly requires consent only by those defendants to be dismissed.

Due to the above-discussed confusion in the language of Rule 41(a)(1)(ii), plaintiff's counsel in the present case framed his document of dismissal as a Rule 41(a)(2) "motion" with the consent of the Duke defendants. Courts have consistently ruled, however, that when a Rule 41(a)(1) right exists, the requested dismissal is automatically effective without order of court despite the fact that the request is framed as a motion, Williams v. Ezell, 531 F.2d 1261, 1263-64 (5th Cir., 1976), Sanchez v. Vaughn Corporation, 282 F. Supp. 505, 507 (D.C.

Mass., 1968), Wilson and Co. v. Fremont Cake & Meal Co., 83 F. Supp 900, 903 (D.C. Neb., 1949), Watwood v. Barber, 70 F.R.D. 1,3 (N.D. Georgia, 1976), Harkless v. Sweeney Independent School District of Sweeney, Texas, 554 F.2d 1353, 1360 (5th Cir., 1977), Oswalt v. Scripto, Inc., 616 F.2d 191, 195 (5th Cir., 1980), Beneficial Finance Co. of Portsmouth, Inc. v. Lucas, 27 Fed. R. Serv. 896, 897 (4th Cir., 1979). All these decisions are in accord with the mandate of this Court that the Federal Rules be given a "common sense" interpretation, Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978) (per curiam). Thus, if this Court recognizes that Rule 41(a)(1)(ii) does not require consent by defendants not privy to the dismissal, then plaintiff's Rule 41(a)(2) "motion" with the consent of the Duke defendants was automatically effective as a stipulation of dismissal under Rule 41(a)(1)(ii).

If the actions of the parties did not constitute a Rule 41(a)(1)(ii) stipulation of dismissal, then the question of whose approval is required for a consensual dismissal must be explored under Rule 41(a)(2), itself. Admittedly the language of that Rule offers no guidance as to whether or not a dismissal agreed to by the plaintiff and the defendants to be dismissed can be vetoed by the court or another defendant.

Some circuits have recognized that a co-defendant having no cross-claims and no stake in the dismissal does not have the power to force a plaintiff and defendant to continue litigation after they have agreed to a settlement of their dispute. Young v. Wilky Carrier Corporation, 150 F.2d 764 (3rd Cir., 1945) cert. denied 326 U.S. 786; Broadway & Ninety-Sixth Street Realty Corporation v. Loew's Inc., 23 F.R.D. 9 (S.D.N.Y., 1958); Southern Electric Generating Co. v. Allen Bradley Co., 30 F.R.D. 135

(S.D.N.Y., 1962). Other circuits have held that a court considering a Rule 41(a)(2) motion should consider the objections of other defendants not sought to be dismissed, United States v. Wyoming National Bank of Casper, 505 F.2d 1064 (10th Cir., 1974), Banque de Depots v. National Bank of Detroit, 491 F.2d 753 (6th Cir., 1974).

This confusion was reflected in the actions of the trial court in the present case which originally followed the Young v. Wilky Carrier Corp. authority and granted plaintiff's Rule 41(a)(2) motion based on the consent of the Duke defendants and without any hearing involving the other defendants. After Southeastern General Hospital voiced an objection to the dismissal, the court switched its interpretation of the Rule, decided that other defendants had a right to be heard and rescinded the order of dismissal.

Even if other defendants had a right to veto the agreement of dismissal between plaintiff and the Duke defendants, the actions of all parties at the motion hearing of March 9, 1981, indicate that no defendant objected to the dismissal at that time. The defendant Southeastern General Hospital withdrew its previously filed objection stating, through counsel, that it would not be prejudiced by the granting of plaintiff's motion. The Strawcutter defendants indicated that they expected to use the alleged negligence of the Duke defendants as a causation defense (as they ultimately did at trial) and merely requested a 60-day continuance if the Duke dismissal was granted.

Thus, it was ultimately the trial judge, himself, who vetoed the consensual dismissal of the Duke defendants, apparently through concern for his own docket. Again, a division of federal authority exists on the propriety of this reasoning. Some circuits

have held that such a concern is an insufficient reason to deny a Rule 41(a)(2) dismissal, Alamance Industries, Inc. v. Filene's, 291 F.2d 142 (1st Cir., 1961) cert. denied 368 U.S. 831 ("Courts exist to serve the parties and not to serve themselves, or to present a record with respect to dispatch of business. . . . For the court to consider expedition for its own sake 'regardless' of the litigants is to emphasize secondary considerations over primary. . . ."). Other circuits, including the Fourth Circuit in this case, have reached a different result.

Significantly, the agreement of dismissal between the plaintiff and the Duke defendants provided that the case could only be refiled in a state court. The only other condition in the dismissal agreement was the specific provision that plaintiff would have the right to refile within one year regardless of statutes of limitation - a right plaintiff would have had, anyway, under North

Carolina substantive law, Webb v. Nolan, 361 F. Supp. 418 (W.D.N.C., 1972), aff'd 484 F.2d 1049 (4th Cir., 1973), Shuford v K. K. Kawamura Cycle Co., 649 F.2d 261 (4th Cir., 1981).

In rejecting plaintiff's appeal, the Fourth Circuit wrote:

> A most sympathetic case from the plaintiff's point of view here illustrates the great importance of counsel's doing things right. Each failure to dot "i"s and cross "t"s contributed to a multiplication of error to the point where a result unfavorable to the plaintiff was the consequence. [Appendix A, p.50]

The troubling truth is that Rule 41(a) has been subjected to so many contradictory interpretations by the federal courts that an attorney, even after extensive research, can only guess as to which "i"s to dot and which "t"s to cross. Even within the Fourth Circuit, in an identical situation, plaintiff's counsel would have no guidance as to how to effect a consensual dismissal without prejudice. The right of voluntary dismissal

contained in Rule 41(a) is a right of paramount importance in civil litigation. Until this Court chooses to interpret that right, however, it exists only as a Trojan horse for unfortunate plaintiffs like Sammy Morrell.

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III.

EVEN IF THE PLAINTIFF DID NOT INVOKE A STIPULATION OF DISMISSAL UNDER RULE 41(a)(1)(ii) AND EVEN IF THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT PLAINTIFF'S RULE 41(a)(2) MOTION TO DISMISS THE DUKE DEFENDANTS WITHOUT PREJUDICE, THE COURT DID NOT HAVE THE POWER TO GRANT THE DUKE DEFENDANT'S SUBSEQUENT RULE 41(b) MOTION FOR AN INVOLUNTARY DISMISSAL WITH PREJUDICE BASED ON THE COURT'S PERCEPTION THAT PLAINTIFF COULD NOT PREVAIL AT TRIAL.

Following the thwarted attempt by the plaintiff and the Duke defendants to dismiss their litigation under Rule 41(a), the Duke defendants filed a motion for involuntary dismissal under Rule 41(b). Not surprisingly, the plaintiff admitted that he was not desirous of presenting a case against the Duke defendants, at that time, and he did not have any experts prepared to testify against

these defendants.

Rule 41(b) allows a pretrial involuntary dismissal only upon the plaintiff's failure to comply with a rule or order of court or failure to prosecute Admittedly plaintiff had not listed experts in response to the Duke defendant's interrogatories but this failing was based on the simple fact that he had no experts to list - not on any willfulness or bad faith.

This Court has previously reversed a trial court's involuntary dismissal, ostensibly under Rule 41(b), based on the plaintiff's inability to comply with a pretrial production order. After holding that the power to dismiss a complaint because of plaintiff's failure to comply with such an order depended exclusively upon Rule 37, rather than Rule 41(b), this Court wrote:

> The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against

> the opinions of the Court in Hovey v. Elliott, 167 U.S. 409, and Hammond Packing Co. v. Arkansas, 212 U.S. 322. These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. The authors of Rule 37 were well aware of these constitutional considerations. See Notes of Advisory Committee on Rules Rule 37, 28 U.S.C. (1952 ed.), p.4325. [Societe Internationale v. Rogers, 357 U.S. 197, 209 (1958)]
>
> In view of the findings in this case, the position in which the petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner. [Id. at 212]

Significantly, North Carolina law allows a plaintiff to prevail in some medical malpractice cases without the testimony of expert witnesses, Smithers v. Collins, 52 N.C. App. 255, 278 S.E.2d 286 (1981), Jackson v. Sanitarium, 234 N.C. 222, 67 S.E.2d 57 (1951), Stone v. Proctor, 259 N.C. 633, 131 S.E.2d

297 (1963). Although plaintiff did not have experts prepared to testify against the Duke defendants, because of lack of funds, he had prepared a lengthy settlement brochure outlining his contentions which had been delivered to the Duke defendants months earlier. He should have been allowed to elicit facts in support of these contentions of negligence against the Duke defendants from the defendants, themselves, and in the trial of the Strawcutter action such admissions of Duke negligence did, in fact, emerge. At that point, of course, such admissions served only as a causation defense for the Strawcutter defendants.

In the Court of Appeals, the Duke defendants argued a "failure to prosecute" rather than a failure to comply with a rule or order of court in justification of the Rule 41(b) dismissal. The accepted and usual course of judicial proceedings, however, as reflected by the available case law under

that provision, prohibits a dismissal for "failure to prosecute" unless the plaintiff is personally responsible for a clear record of delay or contumacious conduct, McCargo v. Hedrick, 545 F.2d 393 (4th Cir., 1977). Typically this harsh sanction is invoked only when the plaintiff refuses to proceed or to attend pre-trial conferences, Link v. Wabash Railroad Co., 370 U.S. 626 (1972), Blue Mountain Construction Co. v. Werner, 270 F.2d 305 (9th Cir., 1959). In the present case, the plaintiff's counsel admitted that he did not wish to try the case at that time. At no point, however, did he refuse to proceed or to attend any judicial function.

Under the facts of this case, it is clear that there was no basis for a dismissal under Rule 41(b) and the trial court actually dismissed the plaintiff's case because he did not think plaintiff could prevail at trial. Except in the narrow confines

of Rule 56, with its attendant notice requirements, a trial court is simply not allowed to make such a determination. Although the trial court's unfamiliarity with the Federal Rules of Civil Procedure can be explained by his recent ascent to the bench, this Court must exercise its supervisory capacity to review such a departure from the accepted and usual course of judicial proceedings.

CONCLUSION

Rules of Civil Procedure exist to insure a just and orderly trial on the merits of each controversy. They exist as a means to serve the people in the resolution of their disputes, not as a maze through which parties must wander in seach of justice. Over the last fifty years this Court has produced - through promulgation and interpretation - a federal procedure that is basically functional and fair.

Rule 41, on the other hand, stands alone in the Federal Rules of Civil Procedure as

difficult to understand and deadly if misunderstood. Perhaps no other rule has been so variously interpreted by different circuits and, yet, this rule purports to enunciate the standards for the most fundamental of all procedural rights - the orderly termination of a plaintiff's entire action.

When a plaintiff and a defendant reach a resolution of their controversy, Rule 41 should clearly guide the parties and the court to the achievement of that desired end. In this case, the Fourth Circuit never suggested that a plaintiff and a defendant do not have the power to effect such a resolution. Instead, that court pointed to a perceived failure on the part of plaintiff's counsel to dot "i"s and cross "t"s. In light of the diversity of opinion among the federal circuits and the trial court's own chameleonic interpretation of Rule 41, it is hardly surprising that mere attorneys have difficulty in discerning

the requirements of that Rule. If the federal courts choose to deprive the brain-damaged Sammy Morrell of his chance for just compensation based on the dot of an "i", it will be just one more atrocity in the nightmare from which he and his family will never escape.

This Court must fulfill its obligation to all federal litigants to insure that the Rules of Civil Procedure operate to assist, rather than frustrate, the just determination of every action on its merits. Plaintiff respectfully requests that this honorable Court grant this writ of certiorari in order to conclusively determine the issues raised herein.

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IV.

WHEN THE TRIAL COURT OF ITS OWN VOLITION ASSURES COUNSEL PRIOR TO CLOSING ARGUMENTS THAT IT WILL GIVE A PATTERN JURY INSTRUCTION ON INFORMED CONSENT AND PLAINTIFF'S COUNSEL THEREFORE DOES NOT REQUEST AN INFORMED CONSENT INSTRUCTION SPECIFICALLY TAILORED TO THE FACTS OF THE PARTICULAR CASE, THE COURT CAN NOT OF ITS OWN INITIATIVE DELETE THE INFORMED CONSENT INSTRUCTION AFTER CLOSING AGRUMENTS HAVE ALREADY BEEN MADE.

F.R.CIV.P. 51 allows parties to file requested jury instruction and requires the court to "inform counsel of its proposed action upon the requests prior to their arguments to the jury." This rule does not specifically require the court to similarly inform counsel on those elements of its charge not specifically requested by any party. Nevertheless, a "common-sense" interpretation of the Federal Rules of Civil Procedure, Bankers Trust Co. v. Mallis, 435 U.S.381, at

387, (1978) (per curiam), must recognize that when counsel receive assurances from the court that an adequate pattern jury instruction will given, they have the right to rely on those assurances without personally requesting a specific instruction.

The circumstances of the jury charge in this case are summarized in the concurring opinion of the Court of Appeals as follows:

> Before summation, the court advised counsel of his proposed instructions in accordance with rule 51. At that time, it stated that it would give an informed consent charge as set forth in the North Carolina pattern jury instructions, but later it omitted this charge when it instructed the jury. At the conclusion of the instructions, the attorney called the court's attention to the omission, and, complying with rule 51, he noted an objection The court acknowledged that the attorney had requested the charge and that initially the court had agreed to give it. Upon reflection, however, it had deleted the charge. . . . It is true that an instruction on informed consent could have been more felicitously phrased, but after the attorney received assurances that the pattern instruction would be given, his decision not to offer an alternative is quite understandable. (Appendix A, p.74)

The primary opinion of the court, however, states:

> . . . the instruction plaintiff's counsel now insists should have been given had not been requested by counsel. It was originally included in the charge at the district judge's own initiative, just as it was subsequently deleted by him. [Appendix A, p.64]
>
> Morrell's counsel did not request an instruction as to possible negligence deriving from a failure to express adequately the risks in the Strawcutter defendants' acquiescing in the transfer to Duke University Hospital and the attendant delay. He consequently has no valid complaint. . . . [Appendix A, p.67]

The writer of this opinion makes other conclusions in dictum on the appropriateness of the informed consent instruction and the adequacy of the charge. It is clear, however, that the Court felt that counsel's "failure to dot 'i's and cross 't's" (Appendix A, p.50) precluded him from "assigning error to this incident of trial" (Appendix A, p.74).

In the trial of this action, plaintiff pursued alternative theories of negligence. First, the plaintiff introduced evidence that

the Strawcutter defendants were negligent in their care and treatment of Sammy Morrell by failing to make proper diagnostic tests and examinations, failing to diagnose his perinephric abscess and failing to perform a timely operation to drain the abscess. The defendants, on the other hand, claim that they had diagnosed perinephric abscess, had simply failed to enter the diagnosis in the chart and had not operated because of the family's desire to transfer Sammy to the Duke Medical Center for any needed operation. As an alternative theory of negligence, plaintiff introduced evidence to show that if the defendants had actually diagnosed Sammy's perinephric abscess, then they were negligent in failing to inform him of that abscess, its attendant hazards and consequent dangers of any delay in the drainage of the abscess necessitated by a transfer to Duke Hospital.

The jury was instructed on the first theory of negligence, and they apparently believed the contention of the Strawcutter defendants that they had actually made the diagnosis of the abscess and were simply prevented from draining it by the decision of the family to transfer their son to another institution. That set of facts should have triggered a consideration of plaintiff's second theory of negligence: the failure of the Strawcutter defendants to warn the family of any delay in draining this large abscess although the defendants acquiesced in and actually arranged the patient's transfer to Duke Hospital. The Court, however, decided, on the morning of its charge, to eliminate the previously agreed upon instruction on this issue and decided not to give the jury any instruction on the issue of failing to inform. That decision was reversible error.

The Court of Appeals apparently agreed

with the defendants' argument that plaintiff was precluded from raising this issue on appeal and thereby sanctioned the trial court's departure from the obvious requirement of Rule 51. The rules of the game can not be changed after the game is played and a trial court is not allowed to change the jury charge after final arguments have already been made. This Court has the responsibility of interpreting and enforcing the Federal Rules of Civil Procedure thereby assuring fair play to all parties in the Federal Courts.

CONCLUSION

Rule 51 recognizes that counsel must be informed of the court's jury charge before closing arguments are made in order to effectively utilize that right. Although the strict language of the rule only requires the court to inform counsel of its action upon their "requests," this Court has repeatedly held that these rules must be liberally construed to effect their purpose.

When the trial court of its own volition assures counsel prior to closing arguments that it will give a pattern jury instruction and plaintiff's counsel therefore does not request an instruction on that issue tailored to the facts of the particular case, the court should not have the power to delete that instruction after closing arguments have already been made. This Court must continue to enforce its common-sense interpretation of the Rules of Civil Procedure. Contrary precedent must not be allowed to stand

where it infringes on an important right called into play in every single federal trial - the right to make an effective closing argument.

Plaintiff respectfully requests that this petition for a writ of certiorari be granted in order to fully explore the issue discussed herein.

This 24 day of September, 1982.

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